

1 12, which are Exhibits J and K, which are Defendant's
2 Exhibits 1 and 2.

3 THE COURT: Okay. Is there any
4 objection then to the Defendant's 1 and 2.

5 MR. BRIGHTWELL: Your Honor, as long
6 as they are offered only to show what was before the
7 Commission when they adopted this rule I have no
8 objection. One of them is a legal brief by Arnold, White
9 & Durkee, or a position paper. To the extent this was
10 offered for the truth of the matter, I would object.
11 But --

12 MR. MUSCAT: It's all offered as
13 being before the Commission.

14 THE COURT: Defendant's 1 and 2 is
15 admitted into evidence as what was before the Commission.
16 If you could tender those to the court reporter.

17 (Whereupon, Defendant's
18 (Exhibit No. 1-2 were admitted
19 (into evidence.

20 THE COURT: Anything else from the
21 State?

22 MR. MUSCAT: No, Your Honor.

23 THE COURT: Okay. From the defendant
24 intervenor?

25 MR. RICHARDS: Yes, Your Honor, in

1 light of the court's ruling to admit the minutes from the
2 North Texas Emergency Communication District, we have
3 minutes, basically minutes from six other districts which
4 we would like to put into evidence as well because these
5 go to the same topic that was addressed in the North Texas
6 considering what were the districts discussing about the
7 Commission's actions.

8 THE COURT: Why don't you have that
9 marked. Just mark it as -- have the court reporter mark
10 it as Defendant's 3.

11 (Whereupon, Defendant's
12 (Exhibit No. 3 was marked for
13 (identification.

14 THE COURT: Okay. Any objection to
15 Defendant's 3?

16 MR. BRIGHTWELL: No, Your Honor.

17 THE COURT: Defendant's 3 is admitted
18 into evidence.

19 (Whereupon, Defendant's
20 (Exhibit No. 3 was admitted
21 (into evidence.

22 THE COURT: Anything further from the
23 defendant intervenor?

24 MR. MOORE: No, sir.

25 THE COURT: Any rebuttal from the

1 plaintiffs, or do the plaintiffs close?

2 MR. BRIGHTWELL: Plaintiffs close,
3 Your Honor.

4 THE COURT: All right, then we have
5 our evidence.

6 And thank you, Mr. Alvarez.

7 (Whereupon, arguments were
8 (presented by counsel.

9 THE COURT: I want to begin by
10 complimenting the lawyers on their briefs and arguments in
11 this case. I, of course, read the briefs this week and
12 studied them and listened to the arguments today and I
13 think you-all have done a good job of presenting it. And
14 I want to make a couple other preliminary comments before
15 I get into my reasoning.

16 Reference was made in the briefs to the TIF case, and
17 really the TIF case is completely irrelevant here. I
18 think the State made an argument that the legislature
19 thought the cellular people were going to have a heavy
20 burden under the TIF, and as it turned out it didn't have
21 a heavy burden and that might justify this tax. But you
22 really can't reason that way.

23 To begin with, factually, the cellular people are
24 paying into the TIF and they are paying into the TIF at
25 the time what the legislature thought they would pay into

1 the TIF. They are just not paying more, which the
2 legislature never contemplated. I think it was just a
3 mistake with the way the funding worked out. So really
4 the TIF and this case are completely different questions
5 of from that case constitutionality, in this case
6 legislative intent.

7 The failed legislation, I think, in this case really
8 doesn't take us anywhere, though, on figuring out intent.
9 Legislation doesn't pass for all kinds of reasons and to
10 say that this legislation didn't pass really didn't tell
11 us any more than to say that the Lieutenant Governor and
12 the Speaker appoint two members to this committee and/or
13 this Commission and they passed it, so obviously the
14 legislature must think it's what they intend. I really
15 don't think that helps us find legislative intent.

16 So let me tell you kind of how I reasoned on this. I
17 mean, my job really is to find what the legislature
18 intended at the time they passed this statute. And I
19 begin knowing that 911 service is critical to public
20 safety and that that was in the legislature's mind when
21 they set up this scheme.

22 And, secondly, I know that the legislature wanted
23 this 911 service to be self-funded by user's fee and not
24 require general revenue, and they set up two kinds of
25 fees, this customer fee on local and the customer

1 surcharge on intrastate long distance.

2 Now, under 771.071, the legal fee -- local fee may be
3 imposed on each local exchange access line or equivalent
4 local change access line, and the legislature said that
5 the Advisory Commission shall determine what constitutes
6 an equivalent local exchange access line. And they do
7 that by rule making which occurred here and nobody
8 challenges the procedure and the Court is to give
9 deference to their determination.

10 Now, what the legislature did in this subdivision (a)
11 was adopt a concept as opposed to a conception. And
12 that's a very useful distinction in the law and I'll give
13 you an example of what I mean. A concept is
14 communication; a conception is a telephone. And in this
15 case the legislature had a conception, the local exchange
16 access line. I mean, everybody knew what that was. That
17 was a thing, you could describe it, it was concrete, it
18 was a conception.

19 But they also had a concept, the equivalent of a
20 local exchange access line. In other words, something
21 that wasn't a local exchange access line but was equal to
22 it. Just a broad concept that they placed in the Advisory
23 Commission's hands determining what constitutes something
24 that is equal to a local exchange access line. And they
25 did that because of the recognition of technology and

1 changing technology and this would be an extremely easy
2 case if it wasn't then for subdivision (e) because if
3 subdivision (e) wasn't there then the State would win this
4 case hands down. But you do have subdivision (e). And
5 what subdivision (e) says is that a local exchange service
6 provider shall collect the fees imposed on its customers
7 under this section.

8 And then a local exchange service provider is defined
9 back in 771.001(4) to mean a telecommunications carrier
10 providing telecommunications service in a local exchange
11 service area under a certificate of public convenience and
12 necessity issued by the Public Utility Commission of
13 Texas. Now, the question is, does the -- does (e) limit
14 (a)? Well, (e) doesn't expressly limit (a). (a) says who
15 pays the fee; (e) provides how a local exchange service
16 provider shall collect the fee imposed on its customers.
17 So (a) is the, who the fee can be imposed on, (e) is how
18 the local exchange service provider shall collect the fee
19 imposed on its customers.

20 Now, the plaintiffs in this case say, Well, you have
21 to read (e) as limiting (a) because you have to read them
22 together because there's no payment without collection.
23 Well, the problem with that argument is that there's
24 77.073, where the legislature expressly has a concept
25 broader than a local exchange service provider. It has a

1 concept of a service provider, which the plaintiffs admit
2 includes them with regard to the surcharge even though
3 they are not local exchange service providers.

4 And what 77.073 says is that a customer on which a
5 fee or surcharge is imposed is liable for the fee or
6 surcharge in the same manner as fees and that the service
7 provider shall collect the fees and surcharge in the same
8 manner as it collects those charges for service. So, if
9 you say, well, (e) has to limit (a) because you have to
10 have collection to have payment, you don't have (e) -- (e)
11 for collection, you've got 77.073, which clearly sets out
12 collection by service providers. (e) would be specific to
13 local exchange service providers; .073 would be broader
14 for all service providers.

15 Well, the plaintiffs say, But wait a minute, that
16 misreads .073 because it is talking about the surcharges.
17 Well, there's only two fees here -- unless I am missing
18 something -- there's the local customer fee, there's the
19 intrastate long distance surcharge. That's the only two
20 there are. And .073 which is in the same subchapter as
21 both the service fee and equalization surcharge talks
22 about the fee or the surcharge. So expressly .073 applies
23 to both the fee in .071 and the surcharge in .072.

24 Well, then the plaintiff says, But wait a minute, if
25 you read .073 that way, that makes subdivision (e)

1 surplusage, why do you need (e) if that's what .073 means?
2 The problem with that is it's circular. Why do you need
3 .073 if that's what (e) means? If (e) is the way you
4 collect all of the subdivision (a) fees then why does .073
5 make any reference to the subdivision (a) fees? Why isn't
6 it aimed only at the surcharge fees?

7 I think the way -- the better reasoning is that (e)
8 is a specific provision for the local exchange service
9 provider which the legislature knew the fee was going to
10 be imposed on. The legislature didn't have any idea,
11 though, who might be paying the fee for the equivalent
12 local exchange access lines because the legislature at
13 that point didn't know if there would be any equivalent
14 local exchange access lines or who they were. That was
15 something the Advisory Commission was going to determine
16 through rule making.

17 Once the Advisory Commission determined that through
18 rule making then you have to go to .073, which is how
19 those fees get collected. So, the legislature clearly had
20 a concept of service provider that was broader than merely
21 the local exchange service providers. You see that both
22 in the fact that the surcharge is imposed on service
23 providers who aren't local exchange service providers,
24 that liability protection, and .053 has provided to
25 service providers who aren't local exchange service

1 providers. And I think also that the equivalent local
2 exchange line fee can be imposed on service providers who
3 aren't local exchange service providers.

4 Now, two important public policy concerns have --
5 support this finding and that is that PURA was revised in
6 the last section -- in the last session, and now there is
7 going to be competition, direct head-to-head competition
8 with local exchange service providers where land-based
9 providers, land-line based providers who do not have a
10 certificate of public convenience and necessity issued by
11 the PUC will be competing so that, for example, here in
12 Travis County I've got Southwestern Bell and I might
13 get -- I might decide to get whoever this other company
14 was that's coming in, I'm paying the user fee for 911 but
15 if I got this new company then I wouldn't pay the user fee
16 for 911 and the number of people who are paying the 911
17 fee could literally dwindle, regardless of this cellular
18 issue, just setting cellular issue aside.

19 But then we have the cellular issue which is -- the
20 Commission has determined that that's an equivalent local
21 exchange access line and this is a fee that they may
22 impose, they don't have to impose and they have obviously
23 determined that it's in the interest of the 911 emergency
24 service to impose it. In finding legislative intent, you
25 know, I am pretty comfortable really that I've hit it on

1 the money, but if I am wrong about that I'd rather err
2 here on the side of public safety because if I were to
3 find here for the plaintiffs and I was wrong and the
4 legislature had to correct me then we would be 18 months
5 behind the eight ball in collecting these dollars for the
6 911 emergency service.

7 On the other hand, if I am wrong and the legislature
8 has to come in and fix this and make it clear, they don't
9 want to -- cellulars to pay, then they can make some
10 adjustment there.

11 But so I think I am going to err on the side of the
12 911 service, though frankly I don't think I'm erring. So
13 I am going to deny the request for declaratory judgment.

14 Let me ask -- I am going to, even though he's not the
15 winner here today through no fault of his own, he did an
16 excellent job, I am still going to ask Mr. Brightwell to
17 prepare the judgment so there won't be any delay in the
18 preparation of it and that way if you choose to appeal you
19 can move quickly, all right?

20 MR. BRIGHTWELL: Yes.

21 THE COURT: So you will prepare the
22 judgment, submit it to opposing counsel for approval as to
23 form and I'll sign it, you know, Monday, Tuesday, whenever
24 you get it over here and should you decide to take this
25 issue up you can take it up quickly.

1 If the issue does go up I would ask counsel for the
2 Advisory Commission to prepare findings of facts and
3 conclusions of law for me to sign that track the reasoning
4 that I have set out this afternoon so that the Court of
5 Appeals will have that reasoning, though I don't know if
6 they ever read that stuff or not. Okay. Anything else?

7 MR. RICHARDS: One administrative
8 matter. Could we expressly be accepted as intervenors in
9 the case? There's been no specific ruling in the case and
10 if the thing goes up on appeal we have a right to continue
11 with it.

12 THE COURT: Well, if you have
13 intervened you are here unless they strike you on the --
14 this, which they didn't do so --

15 MR. MOORE: Thank you, Your Honor.

16 THE COURT: Anything else? Thank you
17 for the excellent argument; very interesting.

18 Court will be adjourned.

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REPORTER'S CERTIFICATE

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THE STATE OF TEXAS)

COUNTY OF TRAVIS)

I, Albert V. Alvarez, Official Court Reporter in and
for the 345th Judicial District Court of Travis County
Texas, do hereby certify that the foregoing contains a
true and correct transcription of all the proceedings in
the above-styled and numbered cause, all of which occurred
in open court or in chambers and were reported by me.

I further certify that this transcription of the
record of the proceedings truly and correctly reflect the
exhibits, if any, offered by the respective parties.

I further certify that the costs for the preparation
of this hearing is \$_____.

WITNESS MY HAND this the 11th day of March, 1996.

Albert V. Alvarez, CSR #968
Official Court Reporter
345th Judicial District Court
Travis County, Texas

Date of Expiration of Current Certification: 12/31/96

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ALBERT V. ALVAREZ, RMR

APPENDIX 2

E

**HOUSE OF REPRESENTATIVES
COMMITTEE ON PUBLIC SAFETY**

**Subcommittee on Agency Oversight
Public Hearing, August 21, 1996**

Advisory Commission on State Emergency Communications

Statutory, structural, technological and market changes in telecommunications have been occurring and will continue to occur for at least the next several years. During the 74th Legislative Session, the Texas Legislature amended the Public Utility Regulatory Act (PURA) to open competition for the local wireline telecommunications market. Subsequently, the United States Congress passed the federal Telecommunications Act of 1996 to open competition for telecommunications services nationwide. As such, many new local wireline providers are entering the local telecommunications market in Texas and need to provide consistent and comparable E9-1-1 access to their customers. During this same period, the number of citizens using wireless telecommunications in Texas has continued to increase exponentially. Earlier this month, the Federal Communications Commission adopted rules on wireless E9-1-1 service, stating that the goal of their proceeding was "to make wireless services as comparable as possible to wireline service in E911 access." In addition, the number of private switch providers (i.e., business service users that must provide E9-1-1 access to residential facilities) has continued to increase. The Federal Communications Commission also has a pending proceeding on E9-1-1 access to the latter industry.

These changes challenge all parties involved in the provision of 9-1-1 service. Potentially, they present a need to clarify and refine provisions of the Health and Safety Code's 9-1-1 statutes. This will help ensure that the purpose of providing the best and most efficient response to any person in Texas calling 9-1-1 in an emergency continues statewide.

The Advisory Commission on State Emergency Communications, at this time, notes the following issues and potential concomitant legislative attention:

1. The Health and Safety Code's 9-1-1 limitations of liability provisions should be clarified to apply to all service providers of telecommunications involved in providing 9-1-1 service, regardless of service provider or area.

2. The confidentiality provisions related to information provided to a 9-1-1 entity as part of computerized 9-1-1 service (e.g., telephone number and/or location of the caller) and the limitations of liability for any release of such information should be clarified to apply to all service providers, regardless of service provider or area.
3. Clarify that all notice, billing, collection, remittance, and monitoring information provided to the Advisory Commission or the local 9-1-1 entity by a service provider or a business service user related to 9-1-1 service is confidential and is not available for public inspection, regardless of service provider, business service user, or area.
4. Clarify that all new wireline service providers and wireless service providers, like the existing wireline service providers whose customers can access 9-1-1 service, must bill collect, and remit the emergency service fee, regardless of service provider or area.
5. Emergency communication districts should be authorized to voluntarily concur in and adopt for its area any Advisory Commission rule that is not otherwise applicable, and specify that when that occurs, the rule would apply as a rule of the Advisory Commission.
6. The Advisory commission should be authorized to obtain a commercial license and to sub-license or sell 9-1-1 or poison control public education and training materials to the public in Texas and in other states, and authorize the Advisory commission to use all profits from such sales for purpose of the commission.